Commentary: Informed Consent in Psychotherapy—A Multidisciplinary Perspective

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The safety and effectiveness of the mental health system is important to all Americans. Cannell *et al.*'s scholarly and well-researched attempt to formulate informed consent standards for recovered memory therapy is an excellent first step in a process likely to prove crucial to the future of the psychotherapy profession.[1] Recent attempts to solve contentious, complex social problems demonstrate that a multidisciplinary approach—applying economic, philosophical, historical, psychological, medical, legal, and other methodologies—often is the most effective road to consensus and success.[2] A multidisciplinary analysis of the complex issues involved in improving the mental health system shows why informed consent and related issues of treatment efficacy will dominate mental health reform efforts for years to come.

Informed Consent: A Fundamental Human Right

Informed consent is the most important issue in ongoing efforts to improve and reform the mental health system. Informed consent is an essential, internationally recognized, and legally enforceable human right. Like the Magna Carta, the Declaration of Independence, and the U.S. Bill of Rights, the 20th century's Nuremberg Code authoritatively asserted fundamental human rights—most notably the right to informed consent.[3] The concept of informed consent was first applied in research settings but now clearly and enforceably applies to any and all patients undergoing any and all forms of health-care "treatment."[4] Particularly, stringent consent procedures should apply to "treatments" lacking rigorous, empirical evidence of safety and efficacy.[5] All forms of psychotherapy irrefutably fall within the scope of patients' rights to informed consent for health-care treatments (no credible moral, legal, psychiatric, or psychological argument has ever been offered as to why psychotherapists should not conform to the rules followed by other health-care providers).[6]

Opportunity to Implement and Enforce Voluntarily Informed Consent Standards for Psychotherapy

Currently, the psychotherapy professions have a brief, golden opportunity to restore the public trust that was so badly damaged in the debacle of the "dissociation movement" and resulting "repressed memory wars." To begin to regain public confidence, the psychotherapy professions should enthusiastically and voluntarily participate in the process of formulating, implementing, and enforcing informed consent standards, policies, and procedures. Cannell *et al.*'s[1] attempt to provide clear standards for informed consent in recovered memory therapy is an important initial step in providing psychotherapy standards that are generated by highly skilled, mental health professionals. However, to survive legal scrutiny, proposed standards for any form of psychotherapy must minimally protect patients' rights to be informed fully and fairly of the risks and benefits of any proposed treatments, the risks and benefits of

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alternate treatments, and the risks and benefits of no treatment. This standard definition of informed consent will soon be agreed on universally: "Informed consent is defined as the willing acceptance of a medical intervention by a patient after adequate disclosure by the physician of the nature of the intervention, its risks, and benefits, as well as of alternatives with their risks and benefits" (Ref. 7, p 55). As Cannell *et al.*[1] correctly note, standards governing the type of information to be shared with patients will increasingly be governed by a legal "reasonable person" standard and are highly unlikely to be dictated solely by professions with economic conflicts of interest.[7] The parameters of psychotherapists' duties to disclose risks and benefits thus will be measured by the patient's need for information that is material to the patient's right to decide whether to accept or reject the proposed health-care treatment. Anything less violates universal ethics precepts and is almost certain to be viewed by juries as a serious dereliction of duty.

Surgeons v. Astrologers: Which Path Will Psychotherapists Choose?

More than half a century after the Nuremberg Code was internationally accepted and decades after U.S. legal rulings clearly applied informed consent duties to health-care providers, some segments of the psychotherapy professions are still engaged in a unidisciplinary, misinformed debate as to whether psychotherapists must obtain informed consent. For example, as late as 1998, at least one prominent psychotherapy proponent was espousing the curious claim that "The foes of psychotherapy have developed an interesting tactic—a demand for informed consent for psychotherapy."[8] Similarly, in 1996 the American Psychiatric Association (APA) released *Principles of Informed Consent in Psychiatry*:

> Psychotherapy: Informed consent developed in the context of invasive procedures and has since been extended to treatment with medication. *There has always been uncertainty as to the extent to which the doctrine of informed consent is applicable to psychotherapy*[9] [emphasis added] (Section 7, p 6).

Such "uncertainty" stands in stark contrast to the responsible unity seen in other health-care professions and world bioethics communities in acknowledging the vital importance of informed consent in all forms of health-care treatment. Informed-consent-might-not-apply-to-psychotherapy viewpoints are so removed from universal legal, economic, moral, bioethics, and regulatory analysis that they endanger the integrity of the psychotherapy professions. The informed-consent-might-not-apply-to-psychotherapy commentators are unwittingly walking a very dangerous economic-legal-moral tightrope. Legislators of the near future are likely to conclude that if psychotherapists feel they need not comply with basic health-care duties and regulations, then they should not receive health-care reimbursement funds. Thus, informed-consent-might-not-apply-to-psychotherapy theorists pose a serious danger of driving some forms of psychotherapy entirely out of the legally cognizable (and reimbursable) health-care system.

The ongoing confusion about informed consent rights and duties in some psychotherapy circles is contrary to policies and procedures followed throughout the rest of the health-care system. In 1994 the widely distributed American Medical Association News noted, "In the four decades since the term was coined, the doctrine of informed consent has had as big an impact on medicine as the Miranda decision did on law."[10] The 1995 policy statement on informed consent from the American Academy of Pediatrics provides yet another example for the psychotherapy professions.[11] Another example, from the American Medical Association, includes the following language:

> From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. 1. The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives. . . . 2. The patient has the right to make decisions regarding the health care that is recommended by his or her physician. Accordingly, patients may accept or refuse any recommended medical treatment. . . .[12]

Perhaps the most urgent aspect of the widespread problem of psychotherapist violations of informed consent rights is in the realm of enforcement. For example, even though the American Psychological Association Ethics Code has long required documented informed consent for psychotherapy there was virtually no enforcement of this widely violated yet essential rule until litigators, judges, and juries began to enforce it in courtrooms.[13]

To improve and reform the mental health system, regain public confidence, and increase respect from other health-care professionals, the psychotherapy professions should voluntarily produce firm state-

ments acknowledging patient rights to informed consent and to effective treatment. Powerful enforcement mechanisms also should be instituted. Dozens of highly successful malpractice lawsuits and licensing revocation actions have demonstrated that, if mental health practitioners fail to properly respect patients' rights to informed consent, the legal, legislative, and health-care management systems stand ready to enforce compliance. In sum, surgeons obtain informed consent, astrologers do not—which path will psychotherapists choose?

Moving Toward Compliance with Informed Consent Principles

The informed-consent-in-psychotherapy debate became a polarized focus of mental health reform efforts on August 8, 1994, when dozens of prominent psychology practitioners, researchers, and academics[14] sent a public letter to congressional leaders urging them to require that the rules of informed consent be applied to psychotherapy.

> Consumer, patient, and professional groups are just now realizing that psychotherapy patients across America are being subjected to experimental and potentially dangerous forms of "psychotherapy," including "memory retrieval/enhancement" therapy, at taxpayer expense. Even more disturbing is the almost universal practice of subjecting patients to these controversial and potentially dangerous procedures without any semblance of informed consent. We believe that fraud investigations by the F.B.I. and other agencies would reveal that virtually none of the therapists engaged in "memory retrieval" or "memory enhancement" procedures are informing their patients (or insurance companies) of the experimental, very controversial and potentially dangerous nature of these "treatments. . . ."[15]

Further, this 1994 "Barden Letter" sought to tie informed consent compliance with tax funded health-care reimbursements and to ban payments for "treatments" lacking empirical validation.

> To reduce the possibility of future, similar tragedies we suggest that the following language be included in all appropriate sections of relevant health care codes: No tax or tax exempt monies may be used for any form of health care treatment, including any form of psychotherapy, that has not been proven safe and effective by rigorous, valid and reliable scientific Investigations and accepted as safe and effective by a substantial majority of the relevant scientific community.[15]

Although this letter created a firestorm of controversy that endures to the present, it is now clear that the fundamental ideas expressed in the letter have become more and more widely accepted in the legal, public policy, insurance, health-care management, and mental health systems.[5]

For example, it now appears that after years of litigation losses, licensing revocations, and media exposés, the psychotherapy professions are coming to terms with the fundamental right of informed consent. Cannell *et al.*'s[1] proposed standard for informed consent in recovered memory therapy offers hope for real progress in this difficult area. In addition, Beahrs and Gutheil's recent statement stressing the therapeutic and legal benefits and requirements of informed consent in psychotherapy hopefully will lead to increased voluntary compliance. These authors adopt the position that "[psychotherapy] has been ratified as a medical procedure by scientific texts, third-party payors, and the law. With this ratification come legal burdens that constrain all health-care practices. . . . Pivotal among these is the duty of caregivers to provide informed consent. . . . Informed consent is a process of sharing information with patients that is essential to their ability to make rational choices among multiple options in their perceived best interest."[16] Beahrs and Gutheil's new position on informed consent and psychotherapy is virtually identical to one espoused by reform proponents in 1994.[17] The ever-growing acceptance of the reform position on informed consent in psychotherapy bodes well for the future of this important part of the health-care system.

Important Reforms in the Legal and Mental Health Systems

Because of unidisciplinary, overspecialized professional educational models (i.e., lacking essential, relevant information from a range of other disciplines) in law, psychology, and medicine, patients' rights to informed consent and effective psychotherapeutic treatments were virtually ignored by the psychotherapy and legal professions for decades. The most egregious examples of such violations include "therapies" such as lobotomies and those offered by the "multiple-personality-dissociation-repression-recovered memory" (MUP-DRREM)[18] movement. Over the past decade, widespread reports of misconduct associated with the MUP-DRREM movement led to an unprecedented national wave of psychotherapy malpractice litigation. Patients' rights to informed consent played a major role in the jury decisions against MUP-DRREM therapists (Juror interviews were conducted in a number of cases by litigators. A num-

ber of jurors interviewed by this author viewed "treatments" lacking scientific validation as little more than consumer fraud. As one highly educated juror remarked, "If there is no credible scientific evidence that the procedure or method 'treats' illness how can it honestly be called a treatment or therapy . . . . How are such untested and unproved treatments distinguishable from quackery?"). The abuses of the MUP-DRREM therapists and the resulting wave of litigation fundamentally altered regulatory processes in the mental health system. The extraordinary success of legal actions against MUP-DRREM therapists created a national psychotherapy negligence bar, which will ensure ongoing regulation-by-litigation of the mental health professions for decades to come.

Cannell *et al.*[1] understate the case when they correctly note that malpractice suits against therapists for either instilling or recovering false memories of sexual abuse have increased in the last few years and that some of the awards have been large. It is important to note that for every one of the reported jury verdicts and settlements against "recovered memory therapists" there are likely to be 20 to 100 such cases that were settled under strict confidentiality agreements. The essential fact that multidisciplinary historians will note is that a viable, national psychotherapy negligence bar was the direct result of abuses suffered by "dissociative" or "multiple personality" patients in "recovered memory therapy"—most notably failure to obtain informed consent for experimental "treatments." Before 1995, attorneys were quite skeptical that lawsuits seeking compensation for emotional damages from improper psychotherapy could be viable financially. As a result of this longstanding skepticism, successful malpractice claims by psychotherapy patients before the 1995 false memory jury verdicts were limited to cases involving suicide, homicide, or clearly physical injuries (e.g., tardive dyskinesia).[19]

This situation changed in August 1995 when a Minnesota jury returned a verdict of 2.67 million dollars for Vynette Hamanne, a patient who sued Diane Humenansky, MD, for negligently implanting false memories of sexual abuse and for failure to obtain informed consent.[20] Reported over the Associated Press newswire, this story ran in major newspapers and on TV, radio, internet news, and other media sources in the United States and throughout the world. After this verdict, plaintiffs attorneys were increasingly able to convince managing partners of large law firms that investing tens of thousands of dollars in psychotherapy negligence lawsuits was a financially viable practice. The psychotherapy negligence bar was born.

Unnerved by this precedent-setting verdict, insurance interests hired a national expert defense attorney and spent enormous sums (reportedly more than $1 million) defending the second false memory lawsuit brought by a patient. Even so, on January 24, 1996, another Minnesota jury awarded Elizabeth Carlson 2.54 million dollars for her claims that Dr. Humenansky had implanted false memories of sexual abuse using pseudotreatments without informed consent.[21] Detailed post-trial interviews with jury members confirmed the plaintiff legal team's theory that the failure to obtain informed consent for an experimental (not empirically validated) "treatment" was the central issue in the case (juror interviews were conducted in this case by R. Chris Barden and Christopher H. Yetka).

The most significant settlement of such litigation also increased national legal interest in regulating the mental health system. In the *Burgus v. Braun* case,[22] the plaintiff legal team again framed the case as a failure to obtain informed consent for an experimental "therapy" lacking empirical validation. Mrs. Burgus and her family settled their claims of improper treatment and lack of informed consent for a staggering 10.6 million dollars. This settlement became front-page news. In fact, it was reported on Page 1, Column 1 of the *New York Times* and other newspapers as well as on national TV and magazines.[22] The largest jury verdict of similar cases was the Texas case of *Carl v. Keraga*, which produced a jury verdict of 5.8 million dollars.[23] These and related litigation successes and the resulting national media attention on psychotherapy excesses have helped to ensure that informed consent rights will be coenforced by litigators, health-care business organizations, government licensing bodies, legislators, and public interest groups.

It is difficult to overestimate the effect these lawsuits have had on some segments of the mental health industry. As a direct or indirect result of such litigation, many "multiple personality" clinics, "dissociation units," and offending hospitals were closed and the licenses of many "recovered memory" therapists were revoked or restricted. Even malpractice insurance polices for therapists were impacted as at least

one national insurer's contracts were changed to state that therapists who use hypnosis to recover repressed memories of abuse would not be covered under the policy.

Larger societal reforms also are progressing as a direct result of the MUP-DRREM therapists' failure to observe patients' informed consent rights. For example, within the future health-care system, under enforceable informed consent legal standards, "therapies" lacking methodologically adequate empirical validation are unlikely to thrive. Psychotherapists will face increasingly powerful moral-professional-licensing-economic-legal incentives to adopt empirically based treatments (e.g., Beck's cognitive-behavioral therapy for depression) or opt to practice outside of the health-care system (i.e., the astrology route). Some therapies may not survive if practitioners must tell patients the whole truth about the superior efficacy of alternate, less expensive, and safer treatments.

Serious flaws in the way psychotherapists (including MDs, PhDs, and MSWs) are trained were widely exposed by the burgeoning interest in psychotherapy negligence. For example, legal professionals and others are increasingly aware of serious, longstanding deficits in psychotherapist training with regard to basic research on human memory[24] as well as widespread ignorance of basic critical thinking skills and scientific methodology.[25] Endemic myths (e.g., "repressed and recovered memories," "traumatic amnesia," the powers of hypnosis, etc.) widely held by psychotherapists[26] and pseudomethodologies offered in testimony by many mental health "experts"[27] also have received national attention because of the increased interest in fraud and abuse in mental health practices. Public education on these and related issues has been improved dramatically by organizations of concerned citizens and national experts. (The organization of the False Memory Syndrome Foundation by Pamela Freyd, Ph.D., and her gathering of a highly prestigious group of scientific advisors, was instrumental in informing the public as well as the media and legal profession of the dangers of "recovered memory therapy." Such organizations, joining highly educated private citizens with national science experts, are likely to play a role in a range of important future social issues.) Correcting these widespread myths and educational deficits are essential to the long-term effectiveness of the mental health system. Therapists who are uninformed about basic research in their own fields will not be able to explain fairly and competently the risks and benefits of treatment to patients.

Finally, the failure of therapists to obtain informed consent for "recovered memory" therapy led to new and powerful improvements in litigation procedures. Science intensive litigation, the creation of multidisciplinary teams of mental health and legal professionals working as a well-integrated team, has proven devastatingly effective in dozens of malpractice lawsuits, criminal cases, Daubert (antijunk science) hearings, and family law hearings.[28] Science intensive litigation methods are reforming the process by which the legal system attempts to deal with complex scientific issues.[29]

Thus, the following are the most important changes in the mental health system resulting from the MUP-DRREM therapists' failure to obtain informed consent (and other failures): (1) widespread education regarding the fundamental right of informed consent; (2) the creation of a viable psychotherapy negligence bar that will continue to regulate excesses of the mental health systems; (3) widespread education regarding the dangers of pseudotreatments lacking empirical evidence of safety and efficacy; (4) widespread acknowledgment of the scientific, statistical, ethics, and methodological training deficits displayed by many psychotherapists[30]; (5) revocation/restriction of the professional licenses of many of the leaders of the MUP-DRREM movement; and (6) widespread acknowledgment of the lack of self-regulation by the psychotherapy professions. Continuing efforts to address these and other problems are the legacy of psychotherapists' failure to obtain informed consent for experimental, nonvalidated "treatments" such as "recovered memory therapy." As well documented by Cannell *et al.*, these failures to obtain informed consent took place in the face of decades of research, clinical case reports, and powerful warnings by leaders of the profession documenting the predictable dangers of the suggestion and creation of false memories of abuse.[31]

In sum, the psychotherapy professions have an opportunity to reverse decades of error by voluntarily implementing and enforcing adequate informed consent standards for psychotherapy. If the psychotherapy professions fail to use this opportunity to regain public trust, then juries, judges, legislators, Health Management Organization (HMO) managers, and other responsible professionals will do it for

them. The fundamental legal rights of patients and the efficacy and safety of the nation's mental health system must not, cannot, and will not be short-changed by professions laden with economic conflicts of interest. Multidisciplinary efforts to improve the safety and efficacy of the mental health system already have produced significant reforms.

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1. Provision of information: patients should have explanations, in understandable language, of the nature of the ailment or condition; the nature of proposed diagnostic steps and/or treatment(s) and the probability of their success; the existence and nature of the risks involved; and the existence, potential benefits, and risks of recommended alternative treatments (including the choice of no treatment).
2. Assessment of the patient's understanding of the above information.
3. Assessment, if only tacit, of the capacity of the patient or surrogate to make the necessary decision(s).
4. Assurance, insofar as is possible, that the patient has the freedom to choose among the medical alternatives without coercion or manipulation. The goals of this consent process include the development of the patient's comprehensive understanding of the clinical situation, and the timely exercise, by the patient, of active choices regarding the circumstances." See also, President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research and Behavioral Research. Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent on the Patient-Practitioner Relationship. Washington, DC: US Government Printing Office; Vol 1, 1982
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(*See*, Dineen T: Manufacturing Victims (ed 1). Montreal: Robert Davies Publishing, 1996.) [Appendix I contains a complete copy of the "Barden Letter" including a list of the dozens of leaders of the psychological community—including Past Presidents of the American Psychological Association—who signed the letter.] Other examples of untested and potentially dangerous "therapies" include "primal scream therapy", "family of origin psychodramas" and "past life regression therapy." (*See*, Singer MT, Lalich J: Crazy Therapies. New York: Jossey-Bass, 1996)

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